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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LINDSEY RUSSELL AUSTIN, Defendant and Appellant.	G039056 (Super. Ct. No. 03CF1641) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed in part, reversed in part, and remanded as directed.

Richard Glen Boire, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

Lindsey Russell Austin was convicted of 24 counts of grand theft auto (GTA) (Pen. Code, § 487, subd. (d)(1)),[1] six counts of nonsufficient fund (NSF) checks (§ 476a, subd. (a)), seven counts of grand theft (§ 487, subd. (a)), and one count of fraudulent use of an access card (§ 484g). Austin claims the 24 counts of GTA should be reduced to just two counts because the convictions arose out of only two transactions. Austin further contends three counts of NSF checks must be reduced to one count as all three checks involved but one victim and were part of a single intent, plan, or scheme. Alternatively, Austin asserts that if this court affirms all 24 convictions, then many of the sentences must be stayed because the trial court failed to consider and apply section 654. We conclude some of his arguments have merit and the judgment must be reversed in part, and affirmed in part. The matter is remanded as directed for resentencing.

FACTS

Austin makes the following two claims on appeal: (1) The number of convictions must be reduced; and/or (2) the court erred in failing to stay numerous counts under section 654. We will limit our recitation of the facts accordingly.

Quartz Dealer Direct—GTA Counts 1—12 and 18—23 and NSF Checks Count 38

Austin was a part owner of an automobile auction business known as Premium Car Club (PCC). Austin initially met with representatives of Quartz Dealer Direct (Quartz), an auto auction dealer, and reviewed a list of available cars. From the list, Austin selected cars he desired to purchase. On July 15, 2002, and on July 22, 2002, he returned to bid and purchase the cars.[2] PCC took delivery of 24 cars but did not pay for any of them. Numerous calls were placed to PCC to secure payment for the cars to no avail. When Quartz received title for seven of the cars, it contacted PCC and requested

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] The information alleged all the Quartz GTA charges as having occurred on or about July 22, 2002.

payment. Austin replied by asking for a list of the seven cars to which Quartz had titles. The list was later faxed to Austin and, approximately three to four weeks later, Austin gave Quartz checks for the seven cars. The balance for the other 18 cars remained outstanding. It is these 18 cars that form the basis of Austin's convictions on 18 counts of GTA (counts 1-12 & 18-23).

On August 20, 2002, Gary Mohrmann, a part owner of Quartz, went to PCC to demand payment from Austin of the outstanding balance owed. Eventually, Austin gave Mohrmann a series of checks. However, when Mohrmann later called Austin's bank to verify sufficient funds existed in the account to cover the checks, he learned PCC had stopped payment the same day the checks were delivered to him. These checks form the basis of Austin's conviction on one count of a NSF check (count 38).

Tustin Nissan—GTA Counts 24—29 and NSF Checks Counts 13 and 14

In the fall of 2002, PCC purchased six used cars from Tustin Nissan to resell at a public auction. According to Tustin Nissan, the six cars were purchased on separate dates. At trial, invoices were introduced to establish the separate dates of sale. Austin maintained all the cars were purchased on the same date. Austin twice tendered checks for payment on the six cars. On both occasions, the checks were returned marked NSF. The first set of checks was provided to Tustin Nissan on November 26, 2002. The second set was provided on December 9, 2002. These six cars form the basis of Austin's convictions on six counts of GTA (counts 24-29). The two sets of checks form the basis of Austin's convictions on two counts of NSF checks (counts 13 & 14).

Joe's Garage—NSF Checks Counts 15—17

In 2002, PCC held auctions at Joe's Garage. Pursuant to the terms of their written contract, PCC was obligated to pay Joe's Garage $4,000 to $5,000 each week. For a period of time, PCC made its payments to Joe's Garage without any problems, but

in mid-November the bank returned the checks due to NSF. Three checks (written on November 20, 2002, December 3, 2002, and December 10, 2002), form the basis for Austin's convictions on three counts of NSF checks (counts 15, 16 & 17).

West Coast Hogs—Counts 39 and 40

On May 5, 2004, Austin telephoned West Coast Hogs and purchased 10 mini bikes for $550 each, using a Discover card issued to his deceased father. When the credit card company learned the cardholder was deceased, it refused to make payment to West Coast Hogs. This conduct forms the basis for Austin's conviction for one count of fraudulent use of an access card (count 39) and one count of grand theft (count 40).

Remaining Counts

Austin was also charged and convicted on six additional counts of grand theft arising out of his resale of the Quartz vehicles to individual buyers (count 31 Terry Paysinger, count 32 Cyrilo Pierre, count 33 Ramona Genemaras, count 34 Jacqueline Dalton, count 35 Francisco Lopez, and count 37 Jose Salazar). Austin does not challenge his convictions on these six counts.

Austin's Sentence

Austin was sentenced to a total term of four years and eight months in prison. The principal term was a two year sentence on GTA count 1 (Quartz). The court then imposed consecutive subordinate terms of eight months (one-third of the base term) on GTA count 13 (Tustin Nissan), GTA count 18 (Quartz), grand theft count 31 (Paysinger), and grand theft count 40 (West Coast Hogs). The court imposed concurrent terms of two years on all the remaining counts (27 counts of grand theft, five counts of NSF checks, and one count of fraudulent use of an access card). The court also ordered Austin fines totaling $420 and victim restitution totaling $78,094.

DISCUSSION

A. The Bailey Doctrine Applied to 24 GTA Counts

In support of Austin's claim he was erroneously convicted of 22 counts of GTA, he relies on *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*). He correctly contends that under the so-called *Bailey* doctrine, multiple takings from the same victim is a single theft, if the takings are pursuant to one continuing impulse, intent, plan, or scheme. Austin notes our Supreme Court in *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*), overruled on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229, applied the *Bailey* doctrine and concluded the theft of the victim's car, wallet, and pager constituted one theft. The *Ortega* court explained: "'When a defendant steals multiple items during the course of an indivisible transaction involving a single victim, he commits only one robbery or theft notwithstanding the number of items he steals.'" (*Ortega, supra,* 19 Cal.4th at p. 699, quoting *People v Brito* (1991) 232 Cal.App.3d 316, 326, fn. 8.) We agree with Austin's contention the 24 counts of GTA should be reduced to just two convictions (representing one theft transaction involving Quartz and one theft transaction involving Tustin Nissan).

The Attorney General maintains by taking 24 cars with the intent to permanently deprive Quartz and Tustin Nissan of those cars, and not paying for the cars, Austin committed 24 separate and distinct offenses. It quotes a portion of section 487: "Grand theft is theft committed in any of the following cases: [¶] . . . [¶] (d) When the property taken is any of the following: [¶] (1) An automobile, horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, board, gilt, barrow, or pig." The Attorney General then states: "It is significant . . . section 487, subdivision (d)(1), expressly provides that grand theft is committed by the taking of *an* automobile. Thus, each automobile constitutes a separate unit of prosecution." Although it does not specifically state, we presume the Attorney General attaches significance to the choice of the modifier "an" as opposed to "any." If we were to accept this argument,

it would mean the theft of five horses would constitute five counts of grand theft; whereas the theft of five cows (a bovine animal) would constitute but one count of grand theft. We would also have to ignore the introductory clause immediately preceding subsection (1) that reads theft includes: "When the property taken is *any* of the following[.]" (§ 487, subd. (d)(1), italics added.) We are not persuaded this interpretation of the statute is proper, and accordingly, reject this argument.

Relying on *People v. Pater* (1968) 267 Cal.App.2d 921 (*Pater*), the Attorney General next argues case law supports its theory the theft of an automobile "is separate and apart from the theft of money or real or personal property." In *Pater*, defendant was arrested while driving an automobile stolen from the lot of a Sacramento Ford dealer days earlier. (*Id.* at p. 922.) The information charged defendant with GTA (count 1) on the date the automobile was taken from the dealer's lot. Count 2 charged defendant with a violation of Vehicle Code section 10851 (driving a vehicle without the owner's consent) on the date defendant was observed driving the vehicle. (*Id.* at p. 921.) Defendant was convicted on both counts. (*Id.* at p. 924.)

In the *Pater* case, defendant on appeal argued it was error to enter judgment for *both* the offense of GTA and the offense of violation of Vehicle Code section 10851. (*Pater, supra*, 267 Cal.App.2d. at p. 925.) The Attorney General countered because the GTA charge was alleged to have occurred on one date and the violation of Vehicle Code section 10851 to have occurred days later, the "'indivisible course of conduct'" rule would not apply. (*Pater, supra*, 267 Cal.App.2d. at p. 926.) It asserted the "break in the sequence of events once the theft of the automobile has been consummated [made] the driving of the car thereafter a disassociated, separate and severable transaction." (*Ibid.*) The *Pater* court rejected this argument and ultimately concluded count 2 was a lesser included offense of count 1 and must be reversed. It reasoned, "There was just one continuous, indivisible, inseverable act or course of conduct which, as we see it, would have retained its indivisible status so long as defendant retained the original dominion

over the property obtained by the original theft. Neither clocks, calendars nor county boundaries convert one continuing course of conduct into a series of criminal acts." (*Id.* at p. 926.) We fail to see how the *Pater* case advances the Attorney General's argument GTA is different than theft of other types of property for purposes of application of the *Bailey* doctrine.

We note that throughout its brief the Attorney General repeatedly and boldly states, without supplying supporting legal analysis or case authority, the theft of an automobile is somehow distinguishable from the theft of other types of property. The Attorney General discusses the valid case authority Austin cites regarding the *Bailey* doctrine, and in addition, the Attorney General provides for us a few more cases on this topic. (See *Ortega, supra,* 19 Cal. 4th at p. 699 [applying *Bailey* doctrine to taking of multiple items]; *People v. Washington* (1996) 50 Cal.App.4th 568 [*Bailey* doctrine inapplicable to multi-entry burglary]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314 [*Bailey* doctrine applied to reduce counts when defendant's theft of money from an elderly man's multiple accounts related to a single plan/offense]; *People v. Brooks* (1985) 166 Cal.App.3d 24 [one theft count for defendant who kept proceeds from auction sale of 14 items of farm and heavy equipment to 14 consignors]; *People v. Packard* (1982) 131 Cal.App.3d 622 [three-year theft scheme deemed one count of grand theft where no evidence of separate intents and plans]; *People v. Gardner* (1979) 90 Cal.App.3d 42 [defendant killed and took five hogs, but five carcasses constituted but one offense]; and *People v. Sullivan* (1978) 80 Cal.App.3d 16 [jury should be instructed multiple instances of monetary grand theft could constitute a single plan and offense].) However, without providing any legal reasoning, the Attorney General essentially contends this entire body of case law is inapt because none of the cases concern the taking of "an automobile" as specified in section 487. Needless to say, we are not persuaded a logical or legal distinction can be made between an automobile, farm equipment, and a hog carcass. Regardless of the type of property stolen, all courts have held the relevant factual inquiry

is whether the defendant's actions can be attributable to a single course of conduct or several criminal acts. (*Ortega, supra,* 19 Cal.4th at pp. 699-700.)

Applying the relevant factual inquiry in this case, we conclude 22 of the GTA convictions must be reversed. Specifically, as to the theft of the Quartz cars, although there were two bids entered on two separate dates, the purchase of the 18 cars was a single transaction. The Attorney General fails to point to evidence that establishes Austin had a separate and distinct intent or plan with respect to each of the 18 cars. Similarly, although there was evidence establishing the six cars stolen from Tustin Nissan had different purchase dates, the evidence also showed it was essentially only one large theft transaction. Again, there was no evidence to establish Austin had a separate and distinct intent or plan with respect to each of these six cars. Accordingly, we reverse all but one count of GTA regarding the Quartz cars, and all but one count of GTA regarding the Tustin Nissan cars.

B. The Bailey Doctrine Applied to Three NSF Check Counts

Again relying on the *Bailey* doctrine, Austin argues two of the three convictions for writing NSF checks to Joe's Garage must be reversed. Austin acknowledges he wrote separate checks to Joe's Garage on a weekly basis, but he asserts the record reveals only one intent or continuing plan. We conclude the *Bailey* doctrine does not apply to the NSF counts.

As correctly noted by the Attorney General, the *Bailey* doctrine has been applied to many kinds of theft cases, but courts have generally refused to apply the doctrine to situations other than theft. (E.g., *In re David D.* (1997) 52 Cal.App.4th 304 [vandalism]; *People v. Drake* (1996) 42 Cal.App.4th 592 [Medi-Cal fraud offenses]; *In re William S.* (1989) 208 Cal.App.3d 313 [multiple entry burglary case]; and *People v. Neder* (1971) 16 Cal.App.3d 846 [forgeries].)

Section 476a, subdivision (a), criminalizes the willful making, drawing, uttering, or delivery of any check with the intent to defraud. This crime requires knowledge that at the time of such making, drawing, uttering, or delivering the maker or drawer there were not sufficient funds to cover the check. It is not a theft crime in that it does not require a taking. The offense of issuing a check with insufficient funds is complete when the check is issued with intent to defraud and knowledge of the insufficiency of funds, even if no one is defrauded. (*People v. Freedman* (1952) 111 Cal.App.2d 611, 614.) Unlike GTA, the crime of willfully making a NSF check is not concerned with the end result, i.e., the loss to the victim, but rather focuses on the means. Consequently, each individual check written to Joe's Garage constituted a separate and distinct offense. Austin was properly convicted of three NSF counts for the three checks written to Joe's Garage.

C. Application of Section 654 Requires Resentencing

Austin also challenges the concurrent sentences imposed for the 24 GTA convictions discussed above if he fails to prevail on his *Bailey* doctrine argument. Based on our ruling 22 GTA convictions must be reversed, we have modified and will address Austin's section 654 arguments with respect to the remaining convictions that are affirmed.

"Section 654 precludes multiple punishments for a single or indivisible course of conduct. [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Where a defendant has been convicted of multiple counts arising out a single course of conduct our Supreme Court has observed if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and, therefore, may be punished only once. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Where a defendant entertained multiple criminal

objectives, a defendant may be separately punished for offenses that share common acts and are part of an indivisible course of conduct where the defendant entertained multiple criminal objectives. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; *People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085.) Whether a course of conduct is indivisible depends on a "defendant's intent and objective, not the temporal proximity of his offenses . . . ." (*People v. Hicks* (1993) 6 Cal.4th 784, 789; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Austin asserts the court failed to consider section 654 when sentencing him and essentially all but four sentences must be stayed. We will address each proposed sentence in turn.

First, with respect to the victim Quartz, Austin contends the one remaining GTA conviction (count 1) and one NSF check conviction (count 38) were the result of a single objective, and therefore, one sentence must be stayed pursuant to section 654. Likewise, with respect to Tustin Nissan, he maintains the one remaining GTA conviction (count 13) and the two NSF check convictions (counts 13 & 14) were all part of a single intent/objective and, therefore, all but one of the sentences should be stayed pursuant to section 654. We agree. Although we have concluded the NSF check convictions should be affirmed, the sentences on these convictions must be stayed. The checks to Quartz and Tustin Nissan were all part and parcel of the intended theft of those cars. No separate objective can be discerned from the facts.

Second, Austin claims pursuant to section 654 the court was required to stay one of the two sentences imposed for the convictions arising out of the purchase of the mini bikes from West Coast Hogs with his diseased father's Discover card (counts 39 & 40). Austin was convicted of fraudulent use of an access card (§ 484g) and grand theft (§ 487). He argues the card transaction and the taking were part of a single objective and, thus, can only be punished as a single offense. He is right.

Section 484g provides: "Every person who, with the intent to defraud, . . . uses, for the purpose of obtaining money, goods, services, or anything else of value, an access card or access card account information that has been altered, obtained, or retained in violation of [s]ection 484e or 484f, or an access card which he or she knows is forged, expired, or revoked, . . . is guilty of theft. If the value of all money, goods, services, and other things of value obtained in violation of this section exceeds four hundred dollars ($400) in any consecutive six-month period, then the same shall constitute grand theft." It is settled, "'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]' [Citation.]" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Here, the same actions support both the conviction for violating sections 484g and 487. There is no temporal separation between the crimes. Both are theft offenses arising out of the unlawful taking of mini bikes. There is no evidence to support a finding Austin formed a separate intent and objective for each of these offenses. We agree one of the two sentences should have been stayed pursuant to section 654.

Finally, Austin argues it was improper for him to have received separate sentences on all three convictions for giving NSF checks to Joe's Garage (counts 15, 16 & 17). He maintains the sentences on two of the counts must be stayed pursuant to section 654. We disagree. There exists no temporal proximity among the checks. Given the transitory nature of bank balances, each check constituted a separate and distinct intent to defraud. We conclude the sentences on these three convictions are not subject to the provisions of section 654.

DISPOSITION

Austin's conviction for GTA (Quartz), count 1, is affirmed. The convictions on the remaining Quartz GTA convictions (counts 2-12 & 18-23), are reversed. The conviction for GTA (Tustin Nissan), count 18, is affirmed. The

convictions on the remaining Tustin Nissan GTA convictions (counts 19-23), are reversed. The convictions on all remaining counts are affirmed.

The sentences imposed on the remaining convictions are vacated, and the matter is remanded to the trial court for resentencing consistent with this court's ruling regarding the applicability of section 654 to the various counts.

O'LEARY, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.